BRUNEI REPORT

Ang Swee Chuan v Lim Teng Huan

HIGH COURT (BANDAR SERI BEGAWAN) – SUIT NO 297 OF 1987
ROBERTS CJ
1 AND 3 AUGUST 1988

Civil Procedure – O 14 application on counterclaim – Affidavit in support not stating that in deponent's belief there was no defence to claim – Whether defective – Application by defendant for judgment on admission made by plaintiff – Debt admitted by plaintiff – Triable issues in both claim and counterclaim – Whether judgment on counterclaim should be entered – Whether conditional leave to defend ought to be given – Whether unconditional leave ought to be given – Brunei High Court (Civil Procedure) Rules, O 14, O 20 r 3 & O 31 r 6

This was an appeal from an order of the registrar. The defendant had brought a counterclaim against the plaintiff for the sums of $435,806.24 and $20,000 with interest and costs. He soughht final judgment under O 14 of the Brunei High Court (Civil Procedure) Rules and also on admissions under O 31 r 6 of tthe Rules. The registrar made an order under O 31 r 6 granting conditional leave to the plaintiff to defend the counterclaim. The registrar gave judgment for the defendant under O 31 r 6, ordering, inter alia, that execution be stayed until after the trial of the plaintiff's claim and the residue of the counterclaim, provided that the plaintiff gave security within 14 days of the judgment by paying $435,806.24 into court or finding a suitable guarantee and that if no such payment or guarantee was made or found that there be no stay. The application for final judgment under O 14 was dismissed.

With regard to the O 14 application, although there was no affidavit made by the deponent which contained the assertion that, in the deponent's belief, there was no defence to the claim, the registrar found that such assertion was 'superfluous and unnecessary'. Subsequent to the judgment, the defendant had sworn an affidavit correcting this defect. The registrar dismissed the defendant's application for final judgment under O 14 for $435,806.24, which sum was admitted by the plaintiff in his affidavit to be due, on the ground that there were triable issues which ought 'to go for hearing before a judge in open court'. The registrar found that the admission was sufficient to justify the grant of conditional leave to defend under O 31 r 6.

Held, refusing the defendant's application under O 14 and O 31:

(1) In an O 14 application, the presence of words in the applicant's affidavit asserting that, in the deponent's belief, there was no defence to the claim was mandatory and there was left no discretion in the court to make any order under O 14 in the absence of such words.

(2) The registrar having found that there were triable issues raised on the application under O 14, she should have allowed the plaintiff leave to defend and to raise such issues in reduction of any amount due under the claim, unless satisfied that the triable issues related only to the O 14 proceedings and not to those under O 31. There was no such indication and from the pleadings and the various affidavits listed in the registrar's judgment, triable issues did exist, both under the claim and the counterclaim.

(3) The court may, in a proper case, give judgment for a plaintiff on the admission of a defendant, on terms that execution should be stayed until after trial of the counterclaim. This power is discretionary and should not be lightly invoked. A court will normally grant unconditional leave to defend where a defendant shows a triable issue. Unless bad faith has been shown, such leave should not be conditional. In the instant case, the defendant had not shown that the claim as a whole was a sham.

(4) It is not right to give conditional leave to defend if this would oblige the plaintiff to pay into court, or secure a guarantee for a very large sum, as this would be tantamount to giving judgment for the defendant even though there are issues to be tried between the parties.

(5) The mere fact of a counterclaim arising from the same transactions between the parties does not necessarily bring an entitlement to leave to defend, though this is the usual practice. But in this case there was a finding that issues existed between the parties which were of such a nature that the court should not exercise its discretion to give final judgment for the defendant on such part of his counterclaim as is admitted by the plaintiff. To refuse final judgment to the defendant will relieve the plaintiff of hardship which might be caused if he were given leave to defend on onerous conditions and will afford him the opportunity of setting off all or part of the counterclaim against the claim, so that all issues between the parties may be dealt with in one action.

Cases referred to

1 *Tan Tik Sing* v *Gomez Development Co Sdn Bhd* [1979] 2 MLJ 78 (folld)
2 *Showell & Co* v *Bouron* (1883) 52 LJQB 284 (refd)
3 *The Mersey Steamship Co* v *Shuttleworth & Co* (1883) 11 QBD 531 (folld)
4 *Morgan & Son Ltd* v *S Martin Johnson* [1948] 2 All ER 196 (refd)

Legislation referred to

Brunei High Court (Civil Procedure) Rules O 14, O 20 r 3, O 31 r 6
Rules of the Supreme Court [UK] O 14 r 5

TC Chan for the plaintiff.
Raynold Gaik (*Quentin Loh* with him) for the defendant.

Cur Adv Vult

Roberts CJ: This is an appeal, heard in chambers, from an order of the registrar, given on 5 May 1988. This followed arguments on 17 March 1988, in which the defendant sought:

(a) final judgment under O 14 for the two sums of $435,806.24 and $20,000 plus interest and costs; or
(b) final judgment for similar sums on admission under O 31 r 6.

On 5 May the registrar gave judgment for the defendant, ordering that:

(a) he be given judgment for $435,806.24 plus interest and costs under O 31 r 6;
(b) these sums should be deposited in court or a banker's guarantee given;

(c) conditional leave be given to the plaintiff to defend the remainder of the counterclaim when such deposits were made;
(d) final judgment for the defendant under O 14 be refused.

On 25 June, the registrar clarified her earlier order by ordering that:

(a) interest should run from 13 November 1985;
(b) costs should be agreed or taxed;
(c) execution should be stayed until after the trial of the plaintiff's claim and the residue of the counterclaim, provided that the plaintiff gave security within 14 days for the judgment by paying $435,806.24 into court or furnishing a suitable guarantee;
(d) if no such payment or guarantee was made, there should be no stay;
(e) there should be costs in the cause on the applications before her.

I note that, in several places in her judgment and orders, the sum of $430,806.24 is specified. This is a typing error for $435,806.24, which should be substituted for the earlier figures in every case.

On 5 May 1988, in a careful judgment, the registrar set out in detail the arguments advanced by both parties; and I have little to add in this respect to what she said. With regard to O 14, however, it was argued before the registrar that she had no jurisdiction to make any order thereunder since there had been no affidavit made by the defendant which contained the assertion that, in the deponent's belief, there was no defence to the claim.

The registrar found that, although there was no such assertion, the words were 'superfluous and unnecessary'. In doing so, she appears to have overlooked the Malaysian case of *Tan Tik Sing* v *Gomez Development Co Sdn Bhd*,[1] in which it was decided that the presence of such words was mandatory and left no discretion in the court to make any order under O 14 in their absence. Before me, however, it was conceded by counsel for the plaintiff that, as a result of an affidavit, sworn by the defendant on 30 July 1988, this defect had been cured and there was no longer any validity in this argument.

It appears to me, moreover, that the importation into Brunei law by the registrar of O 14 r 5 of the English Rules of the Supreme Court is unnecessary, by reason of various provisions of the Brunei High Court (Civil Procedure) Rules which are of such a nature that reliance can be placed on the Brunei rules alone.

The registrar's attention does not seem to have been drawn to O 20 r 3 which reads:

> Subject to the provisions of Order 22 rule 15, a defendant in an action may set-off, or set up by way of counterclaim, against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sounds in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim.

This rule means that, where there is a counterclaim, it is, for the purposes of O 14, to be considered in the same manner as a claim under that Order, so that a final judgment may be entered thereunder on a counterclaim as it can on a claim. Thus O 14 is available in all respects to a defendant with a counterclaim as it is to a plaintiff.

Although the present English O 14 r 5 states this in clearer terms than the Brunei rules, I have no doubt that the latter are sufficient and that it is consequently not necessary to rely upon any importation of English rules by reason of preliminary r 2 of the Brunei rules.

The registrar dismissed the application of the defendant for an order for final judgment under O 14 for $435,806.24, which sum was admitted by the plaintiff to be due in para 8 of his affidavit dated 29 February 1988, on the ground that there were triable issues between the parties which ought 'to go for hearing before a judge in open court'.

During the hearing, the registrar permitted the plaintiff to amend his application, so as to include in it a request for final judgment on admission under O 31 r 6 of the Brunei rules.

Having found that there were triable issues, the registrar considered the effect of the admission of the plaintiff in his affidavit of 29 February and concluded that it was sufficient to justify the grant of conditional leave to defend under O 31 r 6.

In effect, the position can be simplified and summarized as follows:

(a) in his statement of claim, the plaintiff claims (say) $100;
(b) in his counterclaim, the defendant claims (say) $50;
(c) the counterclaim is less than the claim;
(d) the plaintiff admits, in an affidavit, that he owes the defendant $20, ie a lesser sum than is contained in the counterclaim;
(e) the plaintiff wishes to set-off the amount which he admits to be due under the counterclaim against the amount which he seeks in his statement of claim.

The registrar has found that there are triable issues raised, on the application under O 14. Having done so, I think that she should have allowed the plaintiff leave to defend and to raise such issues in reduction of any amount due under the claim, unless satisfied that the triable issues related only to O 14 proceedings and not to those under O 31.

There is no such indication and I agree with her finding, having examined the pleadings and the various affidavits listed in her judgment, that triable issues exist, both under the claim and the counterclaim.

It was strenuously argued that the claim was a sham and that a careful examination of the affidavits, and in particular of their omissions, would show that this was so and that, in consequence, final judgment should be given for the defendant on such portion of the counterclaim as was admitted in the plaintiff's affidavit. *Showell & Co* v *Bouron*[2] shows that the court may, in a proper case, give judgment for a plaintiff on the admission of a defendant, on terms that execution should be stayed until after trial of the counterclaim in which the defendant claimed damages.

Some doubt is thrown on this case, so far as it can be said to be of general application, by *The Mersey Steamship Co* v *Shuttleworth & Co*,[3] in which the court refused to exercise its power to order final judgment on terms against defendants who admitted a liquidated claim but set up a counterclaim for unliquidated damages for a greater amount. As Cotton LJ observed, 'A plaintiff is not entitled to have the money paid into court unless the counterclaim is frivolous and unsubstantial.'

It must be remembered that this power is discretionary, as is the power under O 14, and that it should not be lightly invoked, as indeed the *Mersey* case[3] makes clear. Similarly, under O 14, a court will normally grant unconditional leave to defend where a defendant shows a triable issue as the registrar has found, in my view, correctly. Unless bad faith has been shown, such leave should not be conditional and I do not find that the defendant has shown that the claim as a whole is a sham. Nor do I think it right to give conditional leave if this would oblige the plaintiff to pay into court, or secure a guarantee, for a very large sum, as this would be tantamount to giving judgment for the defendant even though there are issues to be tried between the parties.

The action arises from the falling out of former partners, who signed a document of dissolution on 13 November 1986 but have been in dispute for most of the time since, on various aspects of the effect of this agreement. The whole claim and counterclaim arise from the same subject matter and the latter is connected with the grounds of defence – see *Morgan & Son Ltd* v *S Martin Johnson*,[4] in which unconditional leave to defend was given. I recognize of course that the mere fact of a counterclaim arising from the same transactions between the parties does not necessarily bring an entitlement to leave to defend, though this is the usual practice. But in this case there is a finding that issues exist between the parties, a finding with which I agree. I consider that they are of such a nature that I should not exercise my discretion to give final judgment for the defendant on such part of his counterclaim as is admitted by the plaintiff.

It will, in any event, be a simple matter, in view of the plaintiff's admission in the affidavit, for the defendant to prove that he is owed $435,806.24 under the counterclaim. To refuse final judgment to the defendant will relieve the plaintiff of hardship which might be caused if he were given leave to defend on onerous conditions and will afford him the opportunity of setting off all or part of the counterclaim against the claim, so that all issues between the parties may be dealt with in one action.

Not without hesitation, in view of the full and careful analysis of the issues by the registrar, I therefore refuse the application by the defendant for judgment under O 14 and O 31 and give unconditional leave to the plaintiff to pursue his action and defend the counterclaim. I will not disturb the order for costs in the cause which the registrar made in relation to the application for summary judgment before the registrar. The plaintiff, however, must have the costs of this appeal, such costs to be taxed if not agreed.

Order accordingly.

Solicitors: *Choo Chan & Wong*; *Ho & Siong*.

Reported by *PS Ranjan*